

Richard Smith, Esq; Appell

Sir Thomas Dolman, Kn^t Respond

The Respondent's C A S E.

TH E Respondent being seiz'd of the Mannor of *Enderby*, and other Estate in the County of *Leicester*, the Appellant treated with him for the absolute Purchase thereof, and the Price being agreed,

27 September,
1695. Ar-
ticles.

The Respondent in consideration of 9500 *l.* agreed on, or before the 28th of *November*, then next, at the Appellant's Charges, to convey the said Premises to the Appellant and his Heirs, freed of all Incumbrances committed by the Respondent, or his Father; and the Appellant was to have the Rents from *Michaelmas*, then next, and he Covenanted to pay 5000 *l.* on the said 28th of *November*, and the Remaining 4500 *l.* on *Midsummer*, then next, and Interest at 5 *l. per Cent* from *Michaelmas*, 1695, until the said 9500 *l.* was all paid, and accordingly the Appellant was immediately put into Possession.

That the Respondent's Father, several Years since, Mortgaged the said Premises to one Mr. *Boothby*, for 3920 *l.* at which time there were several Judgments and Recognizances enter'd into, by the Respondent's Father to *Richard Abell*, and others precedent to the said Mortgage, and being out of the Mortgage Money (or otherwise satisfied) the same were assign'd to *Andrew Hull*, to protect *Boothby's* Mortgage:

7 and 8 July,
1698.

And the Executors of *Boothby*, convey'd the Mortgaged Premises to the Appellant, and his Heirs, and assign'd the said several Judgments and Recognizances to *Philip Wenman*, Esq; and Mr. *Haughton* (the Appellant's Solicitor) in Trust for the Appellant; and they were empower'd to acknowledge Satisfaction, release, or discharge the same.

6 Nov. 1699.
Appellant's
Bill.

The Appellant's Wife being Dead, he began to grow uneasy at the Purchase, (he had contracted for) and on Pretence the same were subject to several Recognizances and Judgments, in hopes of getting loose from his said Agreement, exhibited his Bill against the Respondent, thereby praying, that Respondent might clear the Incumbrances, or in Default thereof, the Appellant discharg'd from the said Contract.

The Respondent answer'd, and gave a full and true Account of all he knew, concerning the pretended Incumbrances.

Decree.
24 Feb. 1701.

That the Respondent should by the first Day of *Michaelmas* Term, then next, perform the said Articles, and clear the Incumbrances that affected the said Premises; and refer'd it to Mr. *Gery*, to State what Incumbrances had been discharged, since the said Articles by the Appellant, and what Charges he had been at relating thereto, and to Tax the Appellant his Costs; which Charges and Costs were to be allow'd in part of the Purchase Money, and also to State what Incumbrances had been discharg'd by the Respondent, and what were remaining, and affected the said Premises; and upon the Respondent's clearing the said Incumbrances, the Appellant was to pay the remainder of the Purchase Money, with Interest, according to the Articles; but in Default of the Respondent's clearing the Incumbrances, as aforesaid, 'twas order'd, that the Respondent should repay, what the Appellant had paid, and the Charges, in discharging the Incumbrances, with Interest, at 5 *l. per Cent* and Costs of Suit, discounting what the Appellant had receiv'd out of the Rents. Under this Decree, the Appellant rested nigh three Years.

24 July, 1704.
Mr. Gery's
first Report.

The Master certifies the several Incumbrances, which the Appellant had discharg'd, and his Charge in respect thereof, amounting to 7041 *l.* 18 *s.* 4*d.* and allowed so much to the Appellant, in Part of his Purchase Money; and also certified, that the Respondent had discharg'd several Incumbrances, amounting to 4686 *l.* 14 *s.* 4*d.* and that some Incumbrances remain'd unsatisfied.

13 June, 1705.
Order that
the Master re-
view his Re-
port.

To which Report each side took Exceptions, on hearing whereof several of the Respondent's Exceptions, (touching Incumbrances, which the Master certified to be undischarged) were allow'd, and as to others, the Court respited Judgment therein, and order'd the Master to Tax the Appellant his Costs, of his said Report, and the subsequent Costs to that time, and on payment thereof by the Respondent, 'twas refer'd back to the Master, to review his said Report on the whole matter, and the Respondent was to procure the Master's Report, by the first Day of the next Term, and the Costs of this Report were tax'd at 48 *l.* 11 *s.* 1*d.* which, (altho' Excessive) the Respondent paid.

10 Nov. 1705.

The said Mr. *Haughton*, the Appellant's Solicitor having got in his Custody several of the Respondent's Deeds and Papers, and the before mentioned Assignment, of the said several Judgments and Recognizances from Mr. *Boothby's* Executors; the Respondent call'd on him to attend Mr. *Gery* therewith, but he in hopes of disabling the Respondent from procuring the Master's Report, within the time limited, by the last Order, refus'd to produce the same before the Master, whereby it might appear, that the said Incumbrances did in no manner affect the said Estate: Whereupon the Respondent was forced to prefer his Petition to the Right Honourable the Lord High Chancellor, who on hearing both sides, thereupon order'd the time for the Master's making his Report, should be enlarg'd till the first Seal after *Christmas*, and that Mr. *Haughton*, should produce before the Master all such Assignments which he had in his Custody, relating to the Premises, as the Master should Direct, which he delay'd as long as he could, but at length did.

The

23 Jan. 1705. The time for the Master's making his further Report was enlarg'd, but the Master was to take an Account, and make a separate Report of what the Appellant had paid in Part of his Purchase Money, and for Charges, of discharging Incumbrances, and what is Due to him for principle Interest and Costs, discounting *Mefne* Profits receiv'd, that no time might be lost. Upon this the Appellant rested a great while, and would not bring in his Discharge before the Master.

16 Nov. 1706. The Master certifies Due to the Appellant for principle Interest and Charges, of paying off the Incumbrances, (after deducting the Rents receiv'd) 6225 l. 9 s. 4 d.; and exparte Taxes, the Costs at 211 l. 9 s. 7 d. in which the Master allowed the Appellant the Charges, in paying off the Incumbrances, 74 l. 6 d. in one entire Summ, and allow'd it Interest.

With this Report the Appellant seem'd pleas'd, and confirm'd it unless Cause, and on the 3d, of December following, the Master was order'd review his former Report, and particularly the Assignments of Mr. *Wenman*, and Mr. *Haughton*, and to State the same to the Court.

13 Feb. 1706. The Master made his further Report, and therein particularly States the Assignment made to Mr. *Wenman* and *Haughton*; and also certifies that Satisfaction had been acknowledg'd on the Records of several Judgments, which in his former Report were mention'd to be unsatisfied, and several other Debts which in his former Report he had mentioned, to remain a Charge upon the Premises, and States some Incumbrances then remaining.

On hearing Exceptions to the last Report, and of the special Matter thereof, the Exceptions were over-ruled with this Direction: *That it should be refer'd back to the Master, to Examine and certifie what Incumbrances had been discharg'd since the said Report, and what Incumbrances remain'd unsatisfied, and how far the same wou'd probably affect the Estate in Question, and to certifie the same specially to the Court.* And as to the special matter of the said Report, concerning the said Incumbrances assign'd to *Andrew Hull*, and afterwards to Mr. *Wenman* and *Haughton*, the Assignment thereof to *Hull*, being accidentally Burnt before the Appellant's Purchase; whereupon his Lordship declar'd the said Judgments and Recognizances were not Incumbrances, which affected the Premises.

9 May, 1707. The Master certifies all the Incumbrances discharg'd, except a Recognizance enter'd into by the Respondent's Father, and others, in the Year, 1670: in 4000 l. to Sir *Robert Gayer*, as a Collateral security only upon Sir *George Prettyman's*, borrowing 2000 l. of Sir *Robert Gayer*, and Mortgaging to him the Mannor of *Broad-water* in *Suffex*, for securing the repayment thereof, with Interest, and that a Defeazance was executed by Sir *Robert*, for reconveying the said Mortgaged Premises, and vacating the said Recognizance on payment of the said 2000 l. with Interest. And also certifies, that several subsequent Assignments were made of the said Mortgaged Premises, and Recognizance for greater Summs of Money, but without the privity of the said Sir *Thomas Dolman*: And that the Respondent had exhibited his Bill against *Mary Marsb*, now the Wife of *Anthony Eyans*, (who had been in Possession of the said Mortgaged Premises ever since July, 1698,) and others to be reliev'd against the said Recognizance. And also certifies two other Causes depending between several Persons, intitled under the said Mortgage for 2000 l. and the Assignments thereof, and that they Claim no Benefit by the said Recognizance; and that the said Mortgaged Premises were Decreed to be Sold, and were worth 250 l. per Annum, and would yield 6000 l. to be Sold; and the Mortgage to Sir *Robert Gayer* for 2000 l. being the first Incumbrance, was to be first paid out of the Purchase Money, so that took all manner of fear away.

12 July, 1707. On hearing the special Matter of the last Report, his Lordship declared, There was no reasonable fear of any Incumbrance that affected the Estate, except the said Recognizance to Sir *Robert Gayer*; and for as much as upon hearing of a Cause that Day, betw een the now Respondent, then Plaintiff, and the said *Eyans* and his Wife, and others Defendants, it appearing that the said Recognizance was nigh, if not fully satisfied; it was Decreed that an Account should be taken of what remain'd Due of the said 2000 l. and Interest, and that on the Respondent's payment of what remain'd Due, if any thing Possession of the Mannor of *Broadwater* be deliver'd to him, until he should be reimburs'd, what he should pay to the said *Eyans*, with his Costs, and that the said Recognizance should be taken as void against the Respondent, and his Estate discharg'd from the same, and all Parties to the said Suit were perpetually enjoyn'd against prosecuting the said Recognizance, against the Respondent's Estate, and his Lordship therefore order'd, That as to the Appellant's Indemnity against the said Recognizance, he ought to stand in the Respondent's place, and to have the benefit of the said Decree, and that the Appellant should proceed in his Purchase, and come to an Account before the said Master for what of his Purchase Money remain'd unpay'd, with Interest, according to the Articles, and the Respondent was order'd to pay the Receiver his Salary, and the Appellant his Costs from the beginning of that Suit, not before Taxed.

May 1. 1708. The Appellant being dissatisfied with the last Order, petition'd for a Re-hearing, which being granted, and the Matter again fully heard, his Lordship dismiss'd the Appellant's Petition, with this Direction only, *That the Respondent should forthwith, procure the said Recognizance to be discharg'd, or in Default thereof, that so much as the Master should think sufficient to answer Costs therein, should be deposited in the Master's Hands, out of the Purchase Money.*

19 June 1708. The Master certifies, That on the 12th of July following, there would be Due to the Respondent 5349 l. 1 d. deducting 110 l. which he allow'd the Appellant additional Costs, which reduced the Money Due to the Respondent, to 5239 l. 1 d. and that the Respondent had submitted to deposit with him 50 l. to answer the Costs of discharging *Eyans* Recognizance, according to the said Order.

To

Towhich Report the Appellant only took some frivolous Exceptions, as to the Computation of Interest, and the time of deducting his Costs, which came before the Court.

19 July, 1708.
Fourth Order
Appeal'd against.

These Exceptions were fully heard, and all over-rul'd, and the last Report confirm'd, and his Lordship order'd the Appellant to pay the Money certified Due to the Respondent, on the 29th of September following; with Interest for 3874 l. 15 s. 2d. part thereof (being Principle Money) from the time 'twas last computed to the said 29th of September, which being computed by the Register, came to 41 l. 19 s. 7 d. and being added to the 5239 l. 1 d. before certified, makes the whole 5280 l. 19 s. 8 d. Due to the Respondent at Michaelmas last.

13 Oct. 1708.
Fifth Order
Appeal'd against.

The Appellant making a Default of payment of the said Money Due to the Respondent at Michaelmas last, and having enter'd a Caveat against the Respondent's In-rolling the Decree, and the time appointed for payment being Lapsed, 'twas pray'd by the Respondent, and order'd accordingly, that the time for payment should be enlarged until the 30th of October then following, and that Interest should be computed to that time by the Register, which being done, and added to the aforesaid Summ of 5280 l. 19 s. 8 d. made the whole 5302 l. 16 s. And on an Affidavit of the Appellant's absconding, 'twas further order'd, That service of a Writ of Execution; of that Order on his Clerk in Court, should be good Service.

The Appellant being in Contempt, for not performing the said Decree has appeal'd to your Lordships, against the said five several Orders, made the 25th of April, 12th, July, 1707: And 1st, May, 19th, July, and 13th, October, 1708. And the several Reports made pursuant thereto, and Assigns the following Errors.

1st, Error. That by the Order of the 25th of April, 1707, an unlimited time was given to the Respondent, to clear the Incumbrances.

Answer. It appearing by the special Master of the precedent Report, that the Appellant had unreasonably insisted, that the Incumbrances assign'd to his own Trustees, were subsisting and affected the Estate in Question; his Lordship by the said Order of 25th of April, determined that matter against the Appellant, and also allow'd several Exceptions taken by the Respondent, to the Master's Report, touching Incumbrances remaining unsatisfied, which in Fact were discharged; whereupon 'twas highly Necessary, and Reasonable to refer it back to the Master, to Re-examine and state the Matter of the Incumbrances, specially to the Court; however, his Lordship was pleas'd to Order the Master to make his Report in a Week, on Hearing whereof, in Case any Incumbrances had appear'd, that had been the proper time to give final Directions.

2d, Error. That by the Order of the 12th July, 1707, the benefit of a Decree which the Respondent had obtain'd against an Incumbrancer, was assign'd to the Appellant as his Security, against a Recognizance of 4000 l.

Answer. The Recognizance was only a Collateral Security for payment of 2000 l. Mortgage Money, whereof the Conuzee had receiv'd 2000 l. in one Summ, and had had ten Years quiet Possession of the Mortgaged Premises, at 220 l. per Ann. and the same were actually Sold to Mr. Tench, by the Court of Chancery for 6600 l. all manner of fear arising from that Incumbrance vanishes.

3d, Error. That the Appellant is to pay Interest for his Purchase Money, during the time the Estate was in the Hands of a Receiver, appointed by the Court.

Answer. The Receiver was but six Months, and was the same that manag'd the said Estate for the Appellant before, and at his Nomination appointed Receiver by the Master, however, since there was some Grounds for appointing a Receiver, whilst the Matter touching the Incumbrances remain'd undetermin'd, the Court thought fit to charge the Respondent with his Sallary, and he accordingly discounted it out of what was coming to him from the Appellant.

4th, Error. That the Orders of the 19th of July, and 13th of October, 1708, do confirm a Report, wherein the Master Computes Interest upon Interest for 139 l. and that the Expence and Charges Decreed to the Appellant, for paying off the Incumbrances, and the Appellant's Costs of Suit are discounted too late.

Answer. The Master's Computation was according to the Constant usage of the Court, and the Appellant even in the Account in Question, had Interest allow'd him for all his Expences, in taking in the Incumbrances, and drawing the Conveyance, which he ought to bear out of his own Pocket, but that Report being inroll'd could not be alter'd, so the Respondent was forc'd to Submit to it.

The Respondent humbly observes to your Lordships, on the whole Matter.

1. That in 13 Years time the Appellant has never been disturb'd in his Possession of the Premises, or in the Receipt of his Rents, nor has any Demand been ever made of him, under pretence of any Incumbrance whatsoever.

2. That he does not pretend, by the said Report, that there remains any one Incumbrance whatsoever, which affects the Estate in Question, except the said Recognizance, as to which it appears the Appellant is in no Danger.

3. That the Respondent has been Decreed to pay all the Appellant's Costs of Suit, touching the Incumbrances which he hath submitted to, altho' Taxed exparte, wherefore, the Appellant can't make it appear he has been agrieved in any Instance whatsoever.

And upon consideration of this whole Matter, the Respondent humbly prays, the said Petition of Appeal, may be dismiss'd with Costs.

Simon Harcourt.
Spencer Cowper.

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